18338

Supreme Court of the United States,

OCTOBER TERM, 1902.

TERM No. 152.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,
Plaintiff in Error,

vs.

BRIGHT WILLIAMSON,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina.

SUPPLEMENTAL AND REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

The defendant in error cites and relies upon the recently decided case of Vought *vs.* Eastern Building and Loan Association, now reported in Advance Sheets of 172 New York Court of Appeals Reports, at page 508 *et seq.* For the convenience of the Court and in accordance with the suggestion of The Chief Justice, we annex to this supplemental brief, as "Appendix A," a full copy of the opinion of the Court of Appeals of New York in the Vought case.

We do not regard the Vought case as controlling in the case at bar for the following reasons:

FIRST.—The case at bar involves the obligations and contractual relations of the defendant in error as an advanced or borrowing member of the Eastern Building and Loan Association, while in the Vought case the statutory obligations of a borrowing member under the laws of New York were not considered or passed upon in any way.

SECOND.—In the case at bar, the ambiguous language of the original Articles of Incorporation of the Eastern Building and Loan Association, which was the direct subject of construction and adjudication in the Vought case, is avoided by the fact that on May 14, 1894, the plaintiff in error, at an annual meeting of its stockholders and by their unanimous action, amended its articles of incorporation and expressly provided that "instalment stock shall mature and be payable when the dues paid thereon, with the profits apportioned and credited thereto, shall equal $100 per share."

Transcript, p. 58;
Amended Articles of Incorp., Art. VIII., § 3.

The amended Articles of Incorporation of 1894 also provide that "whenever the dues or monthly instalments on any shares upon which advances or loans have been made shall, with the earnings credited thereto, amount to the face value of said shares, the same shall be redeemed and shall be cancelled together with all the securities given therewith, except where advances have been made on shares on the security thereof alone and the same has matured as aforesaid, the maturity or face value thereof shall be paid, less the amount of the advance made thereon, unless the advance or loan shall have been previously paid."

Transcript, p. 61;
Amended Articles of Incorp. of 1894, Art. XI., § 2.

The amended Articles of Incorporation also provide that "except as otherwise provided, profits and losses shall be apportioned upon all shares in force in like proportion to the amount paid in thereon for the average time of investment."

Transcript, p. 63;
Amended Articles of Incorp. of 1894, Art. XIV., § 4.

It was not until about a year after the adoption of these amended Articles of Incorporation that the defendant in error made application for an advance upon his shares and became an advanced or borrowing member.

Transcript, pp. 46, 47, Exhibits "I," "J," and "K."

Necessarily this advance had to be made under the terms and provisions of the amended Articles of Incorporation of 1894.

As shown in our first brief, these amended Articles of Incorporation were unanimously adopted, and it would also seem that the defendant in error was represented by proxy at the stockholders' meeting which adopted the amended Articles, he having regularly appointed "the Secretary of said Association for me and in my name, place and stead to appear and vote as my proxy upon any and all shares of stock at any time held by me or standing in my name in said Association during my absence at any and all meetings of stockholders or directors, and upon any and all matters which may properly come before any such meeting."

Transcript, p. 24, Exhibit "A."

THIRD.—The Vought case is not before this Court upon this writ of error in such form that it can be taken into account and considered as a part of the record upon which this case must be heard and determined.

The opinion in the Vought case does not involve

the construction, meaning and effect of the explicit provisions of the statutes of New York which were invoked and relied upon by the plaintiff in error in this case in the courts of South Carolina. This Court, so far as the questions involved in this case are concerned, must look to the record in order to determine whether full faith and credit were given to the laws of New York, as proven in the Courts of South Carolina, and whether the equal protection of the laws was accorded in those courts to the plaintiff in error.

Chapter 122 of the laws of New York of 1851, and Chapter 564 of the Laws of New York of 1875, were proven as facts in this case in the South Carolina courts.

Transcript, pp. 64–68, 68–71.

The cases of O'Malley *vs.* People's Building, Loan & Savings Association (92 Hun, N. Y., 572), People *vs.* Lowe (117 N. Y., 175) and Concordia Savings & Aid Association *vs.* Reed (93 N. Y., 474), as well as the Englehardt case (148 N. Y., 281) were also given in evidence and proven as facts in the Courts of South Carolina.

Transcript, pp. 71–84.

The laws of New York were also proven as facts by the testimony of an expert and competent witness, who, in addition to testifying as to the laws of New York, also testified that "the net earnings of the Association have, at stated periods, been apportioned and credited to all shares in good standing in the same ratio."

Transcript, pp. 44, 45, Depo. of D. A. Pierce.

We submit that this Court in this case must determine the same upon the record and not by mere reference to an opinion of the Court of Appeals of New York in a case not turning upon the same state of facts, not involving the construction of the same

statutory provisions, and which was decided upon demurrer to the evidence only, and not upon proof of the exact status of the member's interests and rights in the corporation as in the case at bar.

The Vought case, as an inspection of the opinion will show, was decided upon a demurrer to the evidence. The lower Court in New York had held that the plaintiff in that case did not make out a *prima facie* case by offering in evidence his stock certificate in the association containing the agreement to pay its par value at the expiration of seventy-eight months, and the Court of Appeals, perhaps not improperly, reversed the decision of the lower Court and held that upon its face the contract was a binding obligation, and that the suit should not have been dismissed by the Court below upon the theory that a *prima facie* case had not been made out. The Vought case was not finally disposed of by the decision of the Court of Appeals, but was *reversed for a new trial.*

If it is proper for this Court to look at the opinion in the Vought case as bearing upon the determination of the case at bar, then we assume that it is proper for us to say that that case is now upon the calendar of the trial Court at Syracuse for trial upon its merits, and that it is the purpose of the defendant Association to retry the case, introduce the amended Articles of Incorporation of 1894, and make proof that the aliquot share of the plaintiff Vought in the assets of the defendant Association is not equal to the par value of the plaintiff's shares of stock. What the determination of the courts of New York will be if the same facts as to this appear in the Vought case, upon a retrial thereof, as those which appear in the record in the case at bar can only be a matter of conjecture. It is fair to assume, however, that as the Court of Appeals of New York did not in the Vought case overrule or qualify the previous decisions of the New York Court of Appeals in the cases of People vs. Lowe (117 N. Y., 175), Englehardt vs. Fifth Ward, &c., Association (148 N. Y.,

281) and Reed vs. Concordia Association (93 N. Y., 474), that it will, when the Vought case again comes before it for consideration, apply the principles laid down in those cases and hold, as those cases do, that the Eastern Building and Loan Association, being a purely mutual corporation, none of its members can, as between themselves, be accorded preferences in the withdrawal of their contributions to the capital stock of the corporation.

It was suggested upon the oral argument that this Court might look at the opinion of the Court of Appeals in the Vought case, but could not look at the record in that case to determine the application of the legal doctrines laid down in the opinion.

We have always understood it to be settled law that an opinion was no broader in its effect than the facts before the Court calling forth the opinion, and that everything beyond a decision of the questions raised upon the facts in the record must be regarded as by way of *dicta* only. Looking at the Vought case in the light of this rule of law, it appears upon the face of the report that it was an "appeal from a judgment of the Appellate Division of the Supreme Court * * * affirming a judgment in favor of the defendant (the Association), entered upon a dismissal of the complaint by the Court at a Trial Term."

Advance Sheets, 172 N. Y., 709.

Mr. Justice Peckham, who is familiar with the New York practice, will agree with us that this shows that the opinion was rendered upon the ground that the Court below had erred in holding that the plaintiff had not made out a *prima facie* case upon the allegations of her complaint and the terms of the stock certificate promising payment of the par value of the stock at the expiration of seventy-eight months from the date of the certificate.

However far the opinion of the Court may travel

beyond the proposition that the reversal ef the case was called for because the plaintiff had made out a *prima facie* case, yet everything in the opinion beyond this holding *is by way of dictum only*, and will not, even in the same case upon a second appeal, be regarded as precluding the defendant Association from showing the modifications of the contract embodied in the stock certificate as made either by the amended Articles of Incorporation of 1894, the specific provisions of the statute of New York entering into the contractual relations between the corporation and its members, and the actual facts as to the financial condition of the Association and the interest of the plaintiff therein.

In the case at bar, the exact status of the stock of the defendant in error upon the books of the Association is shown by evidence that is unqualified and uncontradicted.

Transcript, pp. 37–43, Evidence of Nathan C. Visscher.

For these reasons, we think that the opinion of the Court of Appeals of New York in the Vought case is not a controlling authority in the case at bar.

II.

The amended Articles of Incorporation of the Eastern Building and Loan Association adopted on May 14, 1894, and under which the defendant in error became a borrowing or advanced member in April, 1895, are binding upon the defendant in error in this case and limit and qualify the terms and conditions of the stock certificate upon which alone he bases his right to recover.

Tr., pp. 53–54; 58, 59, 60, 61, 63.

The right to amend the Articles of Incorporation was expressly reserved in the original Articles, which provided: "These Articles of Incorporation may be amended at any annual or special meeting of the Association, provided the same is previously endorsed by resolution of the Board of Directors and adopted by a majority vote of stock of the Association."

Transcript, p. 53; Art. XIX. of original Articles.

The alteration made was one clearly in the interest of the Association and its members as a whole and for the protection of the Association against just such claims as the defendant in error makes in this case. An exactly similar question has been determined in a leading English case, in which it is said:

"The question is whether the plaintiff is bound by the altered rule. He gave notice to withdraw under the rules in force when he became a member. The rule was altered to his detriment. The alteration confers a discretionary power upon the directors to make prior payment to any member having not more than fifty pounds standing to his credit on the books of the society. The effect of the alteration is to postpone payment to the plaintiff. It was part of the contract between the plaintiff and the society that the rules might be altered, and the contract was altered according to the rules by which the concurrence of three-fourths of the members then and there present at the meeting when the alteration was proposed was required. * * * It may seem strange that a society should take such a power of altering its rules, but it is questionable whether it is not on the whole greatly to the benefit of all that there should be such a power."

Pepe *v.* City & Suburban Bldg. Soc. (1893), 2 Ch., 311; s. c., 3 "The Reports," 472, 473.

Davies *v.* 2d Chatham Bldg. Soc., 61 L. T., 680.
Supreme Lodge K. of P. *v.* Knight, 117 Ind., 489; s. c., 20 N. E. Rep., 479.
Pain *v.* Societe St. Jean Baptiste (1899), 172 Mass., 319.
Supreme Commandery *v.* Ainsworth, 71 Ala., 445.

"Where the only contract between the society and the member is the original contract under which he became a member," said the Court in a recent English case, "and that, as is the case here, provides for alterations of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be."

Smith *v.* Galloway (1898), 1 Q. B., 71.
Pain *v.* Societe, etc., 172 Mass., 319.

III.

This action was begun and tried in the courts of South Carolina as an action upon the contract embodied in the stock certificate. There was no attempt to repudiate the contract and sue upon the ground of fraud, for money had and received. Therefore, the representations alleged to have been made to the defendant in error at the time he subscribed for the stock cannot be looked to to establish the liability of the Association as one arising from fraudulent misrepresentations.

8 Ency. of Pl. & Pr., 894.

IV.

By the decision of the Supreme Court of South Carolina the statutes of New York, forming an integral part of the contract of membership between the defendant in error and the plaintiff in error were denied validity because they were given no effect whatever, hence full faith and credit was not given to these laws and the plaintiff in error was denied the equal protection of the laws.

The trial Court refused either to submit the laws of New York to the jury to be construed and applied by the jury, or to tell the jury the meaning and effect of the laws and advise them that such laws must be given the same effect, as constituent parts of the contract, that would be given them in New York.

Transcript, pp. 84, 85;
Deft.'s Requests to Charge, I., II., III., IV., V., VI., VII., VIII. and IX.

All of these refused requests were made the basis of exceptions upon appeal.

Transcript, pp. 91–99.

It follows that by affirming the action of the trial Court in refusing these requests, the Supreme Court of South Carolina invalidated the laws of New York as parts of the contract of corporate membership and refused "full faith and credit" to such laws.

V.

Counsel for defendant in error upon the argument and in his brief contends that the questions raised in this case are *res judicata* because upon an

appeal from an interlocutory attachment order, before the issues were made up or the case tried upon its merits, the Supreme Court of South Carolina, by way of *dicta*, gave expression to its views as to the nature and construction of the contract between the parties and the effect of the laws of New York. This contention cannot be sustained so far as this writ of error is concerned, because admittedly no final judgment was entered at the time of said interlocutory decision.

Counsel for defendant in error in his brief says: "It is very true that the first decree was entered on an interlocutory motion to dissolve an attachment."

Brief for Defendant in Error, p. 8.

From such an interlocutory decree, when the case was not even at issue, no writ of error could have been prosecuted to this Court and it was only after final judgment in the case by the Supreme Court of South Carolina that it could be brought here.

Rev. Stat. U. S., § 709.
Drake *v.* Kochersperger, 170 U. S., 303.

It was only by the answer of the plaintiff in error as defendant below and its requests for instructions upon the trial of the case on its merits that the federal questions were or could be raised and a final judgment follow, and not until the federal questions had been raised and a final judgment been entered could a writ of error issue to bring the case to this Court.

Gr. West. Tel. Co. *v.* Burnham, 162 U. S., 329, 341.

The record in this case will be searched in vain for any evidence of any adjudication between the parties upon the merits of this case, except the final judgment of the Supreme Court of South Carolina, from which the writ of error here is prosecuted.

The only reference in the transcript to the pro-

ceedings upon the interlocutory order of attachment is that in the opinion of the Supreme Court of South Carolina in the case at bar that Court undertakes to avoid directly passing upon some of the material questions involved by saying that the questions had been disposed of upon the former appeal.

The opinion of the Supreme Court of South Carolina in the attachment proceeding, while it discusses at length the rights of the parties, could not be conclusive even as between the parties in the same suit, because no issues had been made up and the appeal was taken by the defendant in error Williamson from an order dissolving an attachment which he had caused to be issued and levied upon certain property of the association.

See Williamson *v.* Eastern B. & L. Assn., 54 S. C., 582.

It is true that *arguendo* counsel for the association contended upon that appeal that the attachment was in violation of Article XIV., Section 1, of the Constitution of the United States, prohibiting a State from denying to any person the equal protection of the laws, but in the opinion in the attachment proceeding the Supreme Court of South Carolina refused to consider this question, saying: "The case of Blake *v.* McClung, 172 U. S., 239, shows that this would be a very interesting question if it had been passed upon by the Circuit Judge, but as he has made no ruling upon it, the question will not be considered by the Court" (54 S. C., 599).

The judgment of the South Carolina Supreme Court in the attachment proceeding was that the attachment order of the Circuit Judge be reversed (54 S. C. 599).

Manifestly, there was in that proceeding no final adjudication of the rights of the parties, no final judgment from which a writ of error could be prosecuted to this Court. But afterward, when the issues were made up and the case actually tried in the Cir-

cuit Court, as shown by the transcript of record here, the federal questions were expressly raised and rulings thereon requested by way of instructions to the jury, and such instructions being refused, it necessarily follows that the Courts of South Carolina in this case have refused to give full faith and credit to the laws of New York by declining either to submit those laws to the jury to be found as facts, or to instruct the jury as a matter of law that the laws of New York constituted a part of the contract of corporate membership and must be taken into account both as matter of fact and matter of law in determining the rights of the parties.

It seems to us too clear for argument that no question of *res judicata* is involved in the consideration of the case at bar by this Court.

VI.

Upon the record and under the authorities set forth in our original brief and in this supplemental brief we respectfully submit that the judgment of the Supreme Court of South Carolina in this case should be reversed.

Wm. Hepburn Russell,
Wm. Beverly Winslow,
Counsel for Plaintiff in Error.

D. A. Pierce,
Of Counsel.

APPENDIX A.

VOUGHT *v.* EASTERN BUILDING AND LOAN ASSOCIATION.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 9, 1901, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the Court at a Trial Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MARTIN, *J.:* This action was to recover one thousand dollars, the par or maturity value of ten shares of stock issued by the defendant, five shares to the plaintiff and five shares that were assigned to her which were originally issued to one H. E. Newton. The contract or certificates of shares made and issued by the defendant to the plaintiff and her assignor constituted them shareholders, and provided that in consideration of the membership fee of one dollar upon each share, together with the agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by laws printed on the front and back of each certificate, the defendant would pay to such shareholder, or his or her executors, administrators, or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date thereof.

Indorsed upon each of these certificates was the name of the shareholder, his residence, and a statement that the monthly installments were three dollars and seventy-five cents. Indorsed upon the certificate issued to the plaintiff was, "Date of issue Dec. 1st, 1891. Maturity, June 1st, 1898," while upon the certificate originally issued to Newton and transferred to the plaintiff was endorsed, "Date of

issue Oct. 1, 1890. Maturity, April 1, 1897." The terms and conditions referred to provided, in considerable detail, for the withdrawal of shares by a shareholder before the period of maturity, the time and method of such withdrawal, and the terms upon which it might be made.

As the defendant is a going association, and the questions here presented do not arise upon its insolvency or dissolution, it is perhaps doubtful if the articles of association are to be regarded as a part of the contract between the parties. Yet, in the consideration of this case, we shall treat them as material in determining the character and effect of the agreement and the rights of the parties under it. The certificates issued provide that the terms, conditions and by-laws printed on the front and back thereof are made a part of the contract, and, hence, taken together, they constitute the agreement between the parties and the standard by which their rights and liabilities are to be determined. (*People ex rel. Atty.-Gen.* v. *Life & R. Assn.*, 150 N. Y. 94, 108; *Matter of Equitable R. F. L. Assn.*, 131 N. Y. 354, 369.)

At the threshold of this investigation we find an absolute and unqualified promise upon the part of the defendant to pay to each of the holders of the stock owned by the plaintiff the sum of one hundred dollars for each share at the end of seventy-eight months from the date of the certificate, and also an indorsement thereon of the actual time when the shares were to mature. Therefore, as that time had expired and the required payments had been made, it is manifest that the plaintiff was entitled to recover, unless there is some other part of the contract which modifies or changes that provision.

It is contended by the respondent that such a change is wrought by the other provisions contained in the terms, conditions, by-laws and articles of association, and that this agreement to pay at the expiration of seventy-eight months must, in the light of such provisions, be read and construed as an

estimated, and not an actual, time of payment. Its contention is that the provisions of paragraph one of the terms and conditions printed upon the certificate, which provide that the shareholder shall pay seventy-five cents a month on each share until the share *matures or is withdrawn;* section 14 of article 14 of the by-laws, stating that all shareholders shall pay a monthly installment of seventy-five cents on each share, until the same shall be *fully paid;* the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of shares at maturity shall be one hundred dollars per share; the sixth paragraph of the terms and conditions, which provides that at stated periods the profits arising from interest, premiums, fines and other sources shall be apportioned among the shares in good standing, and article eleven of the by-laws, which declares that no money can be drawn from the loan fund for any other purpose than the making of loans on security and to pay amounts due withdrawing shareholders, when given their obvious meaning, effect an utter alteration of the provision by which the defendant agreed to pay the plaintiff one hundred dollars upon each share at the expiration of the term actually designated. If such change or modification is wrought it can only be upon the ground that the provisions of the contract relied upon by the defendant are inconsistent with its promise to pay at the time named, and clearly show that the intention of the parties was that such payment should be made only in the event that upon the shares owned by the plaintiff there had been paid a sum which, together with the profits apportioned to them, would amount to the face of the shares. In other words, the defendant's contention is that those provisions were sufficient to change an absolute promise to pay into a conditional one dependent upon the success of its enterprise. We find nothing in these provisions which would justify any such conclusion. The provision in paragraph one that the plaintiff should pay until the share is

paid or withdrawn, is entirely consistent with the agreement for absolute payment for the shares by the defendant at the time named, as by its contract it agreed that the plaintiff's shares should mature at that time. The provision of section 14, article 14, of the by-laws obviously refers to the agreement in the certificate by which such payments were to be continued for seventy-eight months, and when payments had been made for that period clearly the shares became fully paid. The same may be said as to the fifteenth paragraph of the articles of association, which declares that the amount to be paid to the owners of the shares at maturity shall be one hundred dollars per share. Where shares are to be paid for by paying the sum of seventy-five cents monthly upon each for the period of seventy-eight months, and such payments have been made, it is extremely difficult to discover any theory upon which it can be properly held that such shares have not been fully paid and matured. Nor do we see how the provision for apportioning profits among the shares in any way relieved the defendant from or modified its promise to pay at the time named.

But it is further contended by the respondent that inasmuch as it is provided by article eleven of the by-laws that no money can be drawn from the loan fund for any other purpose except making loans on security and to pay amounts due withdrawing shareholders, the defendant had no authority to pay this claim because the loan fund was the only one from which such payments could be made. If that be true, and the plaintiff is not to be regarded as a withdrawing shareholder, we are unable to see how it could pay the plaintiff's claim even if she had already paid more than the face thereof, as all the receipts of the association are divided into two classes, the loan fund and the expense fund. The latter is dedicated to, and employed in, paying the current expenses of the association, and the loan fund contains all the money received which does not go into the expense fund as

therein provided. Hence, there never could be any fund from which such certificates could be paid, if the contention of the respondent is correct. We think it is not. We are of the opinion that the term "withdrawing shareholders" in that connection means not only shareholders who may withdraw before the maturity of their certificates, but also those who shall withdraw at that time or afterwards. Any other construction would result only in absurdity, and any interpretation which would produce such a result should, if possible, be avoided. Moreover, if the provisions relied upon to modify or change the absolute promise of the defendant to pay at the expiration of seventy-eight months, are at all inconsistent with that provision, still the promise ought not to be changed or modified by any provision of the contract which is less definite and certain than the promise itself. As the contract was prepared by the defendant, if there is any uncertainty or ambiguity as to its meaning it should be resolved in favor of the plaintiff. The defendant is responsible for it, as the language is wholly its own. (*Gillet* v. *Bank of America*, 160 N. Y. 549, 554.)

It is also pertinent to inquire what object the plaintiff or her assignor could possibly have had in purchasing stock, if she or he was to pay the full amount in cash, and then at the end of eleven years receive without interest only the principal which had been thus paid. Obviously the inducement to make such purchase was that the plaintiff and her assignor were to obtain a profit by thus investing their money, as one of the avowed objects of the association was to afford its members a safe and profitable investment of their savings. When we look at the terms, conditions, by-laws and articles of association we find, among other things, that a withdrawing member is to receive six per cent. upon his investment after six months and up to two years, the third year seven per cent., and after that until maturity eight per cent., and that the association may also mature any certificate after one

year and issue a paid-up certificate payable at maturity, with interest at six per cent. It may also cancel any unpledged certificate, by lot, upon the payment to the owner of the amount of the installments paid thereon, together with eight per cent. per annum as added dividend. Again, it may issue paid-up stock at the price of fifty dollars per share, payable on the date of issue, in which case, after the expiration of the time when it is to mature, the party will receive the sum of one hundred dollars. Thus, if the defendant's contention is correct, the member who withdraws before the maturity of his certificate, or whose certificate is matured by the defendant or canceled by it, or the member who purchases paid-up stock, will receive for the amount paid a much greater proportion than the shareholder who continues to the end and pays the full amount required by his certificate. These and other provisions of the contract show quite conclusively that it was not the intent of the agreement that the purchaser of shares, who paid for them in full, should receive only the amount paid by him, without interest, but that its purpose was that the investment should be a profitable one, and in furtherance of that purpose it was that this contract was made. This, like other contracts, should be so interpreted as to carry into effect the intent and purpose of the parties in making it. Can any one suppose for a moment that the plaintiff or her assignor, when she or he purchased this stock, with an agreement that it should mature at the end of seventy-eight months, even suspected that such maturity was to depend upon other conditions or circumstances than the expiration of the time? Obviously not. This contract must be interpreted as an agreement upon the part of the defendant to pay to the plaintiff and her assignor the amount of one hundred dollars upon each of the shares represented by the two certificates in suit at the expiration of seventy-eight months from their date and at the time indorsed upon the back thereof.

It was admitted by the pleadings, if not upon the trial, that prior to the commencement of the action the plaintiff made her proof of claim against the defendant, as required by the terms of the certificates, and that the same was rejected by it. Therefore, the plaintiff was entitled to recover the amount of the certificates in suit.

The contention of the respondent that the plaintiff should not recover for the reason that the application was not introduced in evidence, cannot be upheld. While the certificate recites that "in consideration of the membership fee, together with agreements and statements contained in the application for membership in the Association, and full compliance with the Terms, Conditions and By-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract," it promised to pay as therein provided, still it is obvious that the application for membership was not in fact made a part of the contract, but preceded it and was only mentioned as a part of the consideration therefor. If there was in the application any statement or representation which might have formed a basis of defense, it should have been pleaded and proved by the defendant, and as there was no claim that the application constituted a defense the omission of the plaintiff to introduce it in evidence cannot be regarded as a defect of proof upon her part.

The only remaining question we deem it necessary to consider arises upon the contention of the defendant that it was unauthorized by the statute under which it was organized to make the contract in suit, and, hence, the plaintiff cannot recover. The defendant was organized under the provisions of chapter 122 of the Laws of 1851, and the statutes amendatory thereof and supplemental thereto. We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for if we assume that the making of them was in excess of the ex-

press power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes nor facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power. (*Bissell* v. *Mich. So. & No. Ind. R. R. Cos.*, 22 N. Y. 258; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62; *Rider Life Raft Co.* v. *Roach*, 97 N. Y. 378; *Holmes, Booth & Haydens* v. *Willard*, 125 N. Y. 75, 80; *City of Buffalo* v. *Balcom*, 134 N. Y. 532; *Bath Gas L. Co.* v. *Claffy*, 151, N. Y. 24; *Moss* v. *Cohen*, 158 N. Y. 240, 249; *Hannon* v. *Siegel-Cooper Co.*, 167 N. Y. 244.)

Our attention has been called to several cases in the Supreme Court where a doctrine adverse to this decision has been held, but after a full considera-

tion of those decisions, we have reached the conclusion that they should not be followed.

It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well established principles of law to hold it unenforceable. If it be true that the defendant cannot successfully continue its business upon the plan it has established without disregarding its contracts, or without making false or unauthorized promises to its stockholders to induce the unwary to pay their money to it upon contracts it does not intend to or cannot perform, no unmitigated calamity will be liable to befall the community in which its business is transacted by its suspension or by a final dissolution of the Association. It is better that it should fail than that it should continue to hold out false hopes to investors who may not only be deprived of their promised profits, but may ultimately lose the principal as well.

By these considerations we are led to the conclusion that the certificates upon which this action was brought had matured when it was commenced; that there was due the plaintiff thereon the sum of one thousand dollars and interest after sixty days from the presentation and rejection of the claims made under them; that the trial Court improperly nonsuited the plaintiff, and that the judgments of the courts below should be reversed.

The judgments of the Trial Term and of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.